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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

SAMANTHA LOPEZ, a Minor, by and  
through her Legal Custodian, LILIANA  
CORTEZ, FILADELFO LOPEZ, LAURA  
ALONZO LOPEZ, ANNA LOPEZ &  
JULIA LOPEZ, as surviving heirs of  
DAVID ARNULFO LOPEZ, deceased,

Plaintiffs,

v.

COUNTY OF SAN DIEGO, a municipal  
corporation, CITY OF VISTA, a  
municipal corporation & DOES 1-50,  
inclusive,

Defendants.

No. 07CV2028-JLS(WMc)

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN REPLY TO  
PLAINTIFFS' OPPOSITION TO  
MOTION TO DISMISS PLAINTIFFS'  
ENTIRE COMPLAINT OR TO STRIKE  
EMOTIONAL DISTRESS  
ALLEGATIONS AND REQUIRE  
JOINDER OF NECESSARY PARTIES,  
FILED ON BEHALF OF DEFENDANTS  
COUNTY OF SAN DIEGO AND CITY  
OF VISTA**

**[Fed. Rules Civ. P., Rules 12(b)(6) and (7),  
and 12(f)]**

Date: June 27, 2008

Time: 10:30 a.m.

Courtroom: 6

The Honorable Janis L. Sammartino

**No Oral Argument Unless Requested by  
the Court**

**I**

**PLAINTIFFS CONCEDE MOST POINTS  
IN SUPPORT OF THE MOTION TO DISMISS**

Plaintiffs concede the following points:

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- 1 • The decedent’s siblings, Laura Alonzo Lopez, Anna Lopez and Julie Lopez should
- 2 be dismissed from the action because they are not heirs. (Plaintiffs’ response at 6-
- 3 7.)
- 4 • The allegations on behalf of the father, Filadelfo Lopez, fail to state a claim.
- 5 (Plaintiffs’ response at 7.)
- 6 • The daughter does not have a guardian, and that is required for her to proceed.
- 7 (Plaintiffs’ response at 8-9.)
- 8 • The surviving spouse is a necessary party. (Plaintiffs’ response at 17.)
- 9 • The plaintiffs lack standing to assert constitutional violations on behalf of the
- 10 decedent. (Plaintiffs’ response at 10.)

11 The plaintiffs argue only that they have alleged an unconstitutional policy that  
 12 violated the decedent’s rights, they are entitled to their damages, and are further entitled  
 13 to emotional distress damages. They are mistaken for the reasons stated in the motion to  
 14 dismiss and as further discussed below.

## 15 II

### 16 PLAINTIFFS CANNOT STATE A CLAIM FOR EMOTIONAL DISTRESS

17 Plaintiffs argue that they can state a claim for intentional infliction of emotional  
 18 distress. (Plaintiffs’ response at 11-13.) In support of the argument, they offer dicta from  
 19 a concurring opinion in *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*, 48  
 20 Cal.3d 583 (1989). The facts and issues in *Marlene F.* are not on point. That case  
 21 involved allegations of negligent infliction of emotional distress and *duty* where a  
 22 therapist molested the son of his patient. The duty was inferred by law as a result of the  
 23 physician-patient relationship and the mother was, therefore, a “direct victim” as opposed  
 24 to a “bystander.”<sup>1</sup> There is no such allegation in this case, and the defendants did not owe  
 25 a duty to plaintiffs based merely on plaintiffs’ relationship to the decedent. Therefore,  
 26 the plaintiffs’ only legal theory would be as bystander victims. The *Marlene F.* decision

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27  
 28 <sup>1</sup> The fact pattern and issues presented in *Delia S. v. Torres*, 134 Cal.App.3d 471 (1982),  
 cited by plaintiffs, are similarly distinguishable.

1 did not resolve the issue of “presence” under a bystander theory. Plaintiffs’ novel  
 2 argument has no application because the allegations reveal the defendants’ actions were  
 3 not directed at plaintiffs, and the plaintiffs were not present when the incident occurred.

4 The California Supreme Court clearly requires presence. *Thing v. La Chusa*, 48  
 5 Cal.3d 644 (1989), concluded that societal benefits of certainty in the law, as well as  
 6 traditional concepts of tort law, dictate the limitation of emotional distress damages for  
 7 bystanders. In the absence of physical injury or impact to the plaintiff herself, damages  
 8 for emotional distress are recoverable only if the plaintiff: (1) is *closely related* to the  
 9 injury victim, (2) is *present* at the scene of the injury-producing event at the time it  
 10 occurs and *is then aware* that it is causing injury to the victim, *and* (3) as a result suffers  
 11 *emotional distress beyond* that which would be anticipated in a disinterested witness. *Id.*  
 12 at 647; *Martin v. United States*, 984 F.2d 1033, 1037 (9<sup>th</sup> Cir. 1993).

13 Presence is not an “artificial” requirement as suggested by plaintiffs. (Plaintiffs’  
 14 response at 13.) Correctly put, it is a legal requirement and essential element of the cause  
 15 alleged. The plaintiffs admit they were not present. (*Id.* at 11.) Plaintiffs do not have a  
 16 cause of action for intentional infliction of emotional distress and that claim must be  
 17 dismissed.

### 18 III

#### 19 **PLAINTIFFS CANNOT RECOVER EMOTIONAL DISTRESS DAMAGES** 20 **FOR A WRONGFUL DEATH CLAIM** 21 **AND CLAIMS BROUGHT IN A REPRESENTATIVE CAPACITY**

22 Plaintiffs contend that they may recover emotional distress damages in connection  
 23 with their Section 1983 cause of action, citing several California district court decisions  
 24 that say awarding emotional distress damages is consistent with Section 1983's deterrent  
 25 and compensatory purposes. However, plaintiffs overlook this Court’s decision in  
 26 *Maddux v. Philadelphia Life Ins. Co.*, 77 F. Supp. 2d 1123, 1134 (S.D. Cal. 1999)  
 27 (California’s survival statute expressly bars emotional distress damages).<sup>2</sup> Plaintiffs also

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28 <sup>2</sup> Cited and followed in *Moore v. County of Kern*, 2006 U.S. Dist. LEXIS 56428,  
 \*18-20 (E.D. Cal. 2006).

1 ignore the reasoning in a more recent decision by a Ninth Circuit court. This decision  
 2 holds that California's rules precluding mental distress damages in wrongful death cases  
 3 and survival actions are not inconsistent with the purposes of section 1983. *Venerable v.*  
 4 *City of Sacramento*, 185 F.Supp. 2d 1128 (E.D. Cal. 2002).

5 After noting the various decisions cited by the plaintiffs here that declined to apply  
 6 California's limitation on recovery of a decedent's pain and suffering, the *Venerable* court  
 7 refused to follow their lead, noting the weakness inherent in their logic:

8 "It is not at all obvious that...the need [exists] to include an award of pain  
 9 and suffering for the decedent in addition to other possible damages in order  
 10 to vindicate the [deterrent] purposes of section 1983. ... [T]he court declines  
 11 to adopt the cynical proposition that law enforcement officers generally  
 12 prefer to run the risk of inflicting death than of merely maiming a victim  
 13 because death cuts off a claim for pain and suffering by the decedent. As the  
 14 Supreme Court noted in *Robertson*, '[a] state official contemplating illegal  
 15 activity must always be prepared to face the prospect of a section 1983  
 16 action being filed against him. In light of this prospect, ***even an official  
 17 aware of the intricacies of [state] survivorship law would hardly be  
 18 influenced in his behavior by its provisions.***' And if deterrence is not  
 19 demonstrably affected by the limitation on damages, ***nor is fair  
 20 compensation implicated given that 'the goal of compensating those  
 21 injured by a deprivation of rights provides no basis for requiring  
 22 compensation of one who is merely suing as the executor of the deceased's  
 23 estate.'***" *Venerable v. City of Sacramento*, 185 F. Supp. 2d at 1133 (quoting  
 24 *Robertson v. Wegmann*, 436 U.S. 584, 592 (1978) (internal citations  
 25 omitted) (emphasis added).

18 Because no evidence suggests that awarding damages for pain and suffering serves  
 19 either the deterrent or the compensatory purpose of Section 1983, California's limitation  
 20 on mental distress damages in wrongful death cases and survival actions should be  
 21 upheld. Plaintiffs' request for emotional distress damages should be stricken.

22 DATED: February 25, 2008      Respectfully submitted,

23 JOHN J. SANSONE, County Counsel

24 By s/DAVID G. AXTMANN, Senior Deputy  
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 28

### Declaration of Service

I, the undersigned, declare:

That I am over the age of eighteen years and not a party to the case; I am employed in, or am a resident of, the County of San Diego, California where the service occurred; and my business address is: 1600 Pacific Highway, Room 355, San Diego, California.

On March 26, 2008, I served the following documents: **Memorandum of Points and Authorities in Reply to Plaintiffs' Opposition to Motion to Dismiss Plaintiffs' Entire Complaint or to Strike Emotional Distress Allegations and Require Joinder of Necessary Parties, Filed on Behalf of Defendants County of San Diego and City of Vista** in the following manner:

- ☐ By personally delivering copies to the person served.
- ☐ By placing a copy in a separate envelope, with postage fully prepaid, for each addressee named below and depositing each in the U. S. Mail at San Diego, California.
- ☐ By faxing a copy to the person served. The document was transmitted by facsimile transmission and the transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine.
- ☒ By electronic filing, I served each of the above referenced documents by E-filing, in accordance with the rules governing the electronic filing of documents in the United States District Court for the Southern District of California, as to the following parties:

Victor Manuel Torres: E-Mail [lawforvatos@yahoo.com](mailto:lawforvatos@yahoo.com)

Ezekiel E. Cortez: E-Mail [lawforjustice@aol.com](mailto:lawforjustice@aol.com)

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on March 26, 2008, at San Diego, California.

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By: s/DAVID G. AXTMANN